Office Supreme Court,
FILED
AUG 4 192
CHARLES ELMORE CR
CL

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1928.

No. 234

THE WESTERN & ATLANTIC RAILROAD,

PETITIONER,

Versus

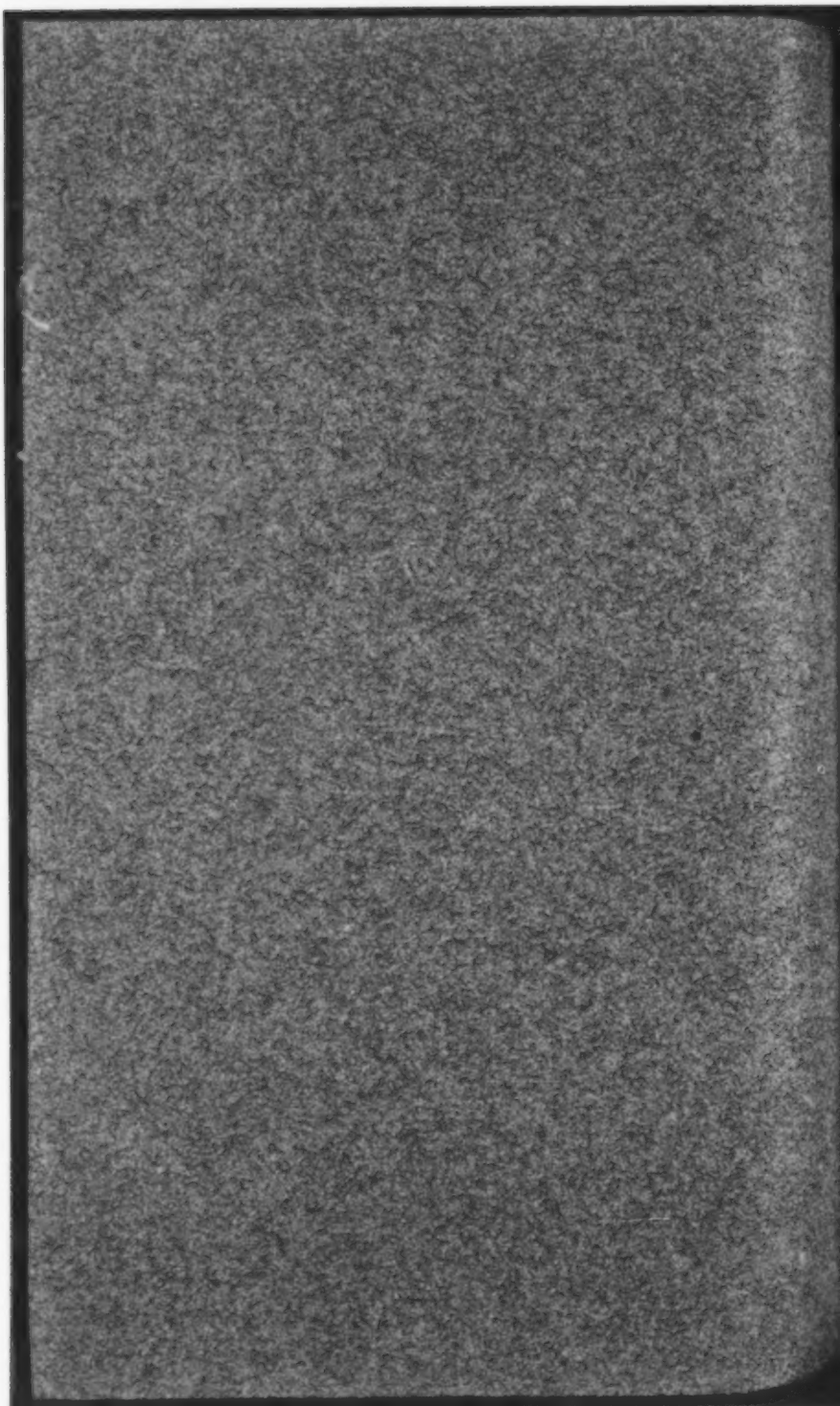
MRS. NORA E. HUGHES, AS ADMINISTRATOR OF THE ESTATE OF IRA L. HUGHES, DECEASED, RESPONDENT.

ANSWER AND BRIEF OF RESPONDENT TO PETITION FOR WRIT OF CERTIORARI IN THE CASE ABOVE STATED.

REUBEN R. ARNOLD,

Attorney for Respondent in Certiorari.

(33,543)



INDEX OF HEADINGS IN THE BRIEF WHICH FOLLOWS

Page

STATEMENT OF FACTS 1

ONE NEW TRIAL WAS GRANTED BY THE TRIAL COURT ON GROUND THAT THE FIRST VERDICT OF $17,500 WAS EXCESSIVE; ON THE SECOND TRIAL, A VERDICT FOR $10,000 WAS RENDERED, WHICH WAS SATISFACTORY TO THE TRIAL COURT, AND THIS IS THE JUDGMENT WHICH WAS AFFIRMED BY COURT OF APPEALS 8

REPLY TO POSITION IN CERTIORARI THAT THERE WAS UNCERTAINTY AS TO THE METHOD BY WHICH DECEDENT WAS KILLED, AND THAT SUIT WAS BROUGHT IN THREE COUNTS 9

TRIAL JUDGE ELIMINATED CHARGE IN DECLARATION THAT NEGLIGENCE IN BUILDING UPRIGHT TIMBERS OF BRIDGE TOO CLOSE TO TRACK WAS CAUSE OF HUGHES' DEATH; JUDGE CHARGED JURY THAT HUGHES ASSUMED RISK AS TO CLOSE PROXIMITY OF BRIDGE TIMBERS TO TRAINS; JUDGE CHARGED JURY GENERAL DOCTRINE OF ASSUMPTION OF RISK, AND LEFT TO JURY QUESTION AS TO WHETHER HUGHES ASSUMED RISK OF DEFECTIVE CONDITION OF TRACK; JUDGE SUBMITTED TO JURY THE CASE ON PROPOSITIONS, FIRST, WHETHER TRACK WAS DEFECTIVE OWING TO NEGLIGENCE OF DEFENDANT; SECOND, WHETHER SUCH NEGLIGENCE WAS CAUSE OF HUGHES' DEATH; THIRD, WHETHER HUGHES WAS GUILTY OF CONTRIBUTORY NEGLIGENCE IN BEING UPON RUNNING BOARD, WHICH WOULD REDUCE DAMAGES; AND FOURTH, JUDGE CHARGED ELABORATELY ON ASSUMPTION OF RISK IN

INDEX OF HEADINGS—Continued

Page

SUBSTANTIALLY LANGUAGE LAID DOWN BY THIS COURT, LEAVING IT TO JURY AS TO WHETHER HIS ASSUMPTION OF THE RISK APPLIED TO THE DEFECTIVE CONDITION OF THE TRACK ----------13, 14

PETITION FOR CERTIORARI CLAIMS ON PAGES 4 AND 5 THAT THERE WAS NO UNUSUAL ROCKING OR LEANING OF THE ENGINE AT THE TIME OF HUGHES' INJURY, AND QUOTES WITNESS KEMP AS SAYING ENGINE WAS THEN RUNNING ALL RIGHT; TESTIMONY OF SEVERAL WITNESSES SHOWED THAT ENGINE GOING OVER THIS PLACE AT ABOUT THIS TIME, ON ACCOUNT OF CONDITION OF TRACK, SWAYED SEVERELY AS BRIDGE WAS ENTERED, MAKING WHAT WOULD OTHERWISE BE GOOD CLEARANCE DANGEROUS; THAT THE TRACK WAS IN DEFECTIVE CONDITION AND THAT ENGINES RUNNING SMOOTHLY UNTIL THE LOW JOINTS WERE REACHED, BEGAN TO ROCK AT THAT PLACE AND ROCKED AND SWAYED UNTIL THE BRIDGE WAS ENTERED---------- 16

DUTIES OF HUGHES REQUIRED HIM TO INSPECT ENGINE FROM RUNNING BOARD AND FRONT OF ENGINE WHILE IT WAS IN MOTION; WAS REQUIRED TO MAKE PRINTED REPORTS ON EACH TRIP AS TO FACTS WHICH COULD ONLY BE ASCERTAINED WHILE INSPECTING THE ENGINE IN MOTION; HUGHES WAS GIVEN NO PRINTED OR WRITTEN INSTRUCTIONS AS TO HOW TO PERFORM HIS DUTIES OTHER THAN THESE REPORTS HE WAS REQUIRED TO FILL IN; HUGHES DID HIS WORK INDEPENDENTLY ON ENGINE AND WAS IN AUTHORITY OVER FIREMAN AND WAS NOT UNDER THE ENGINEER; CUSTOM AND PRACTICE HAD BEEN

INDEX OF HEADINGS—Continued

Page

FOR TRAVELING FIREMEN TO INSPECT ENGINES WHILE IN MOTION 21, 22

ONLY PRINTED BULLETIN IN EXISTENCE FORBIDDING ENGINEERS AND FIREMEN TO GO UPON THE RUNNING BOARD WHILE ENGINE IS IN MOTION WAS ISSUED AFTER HUGHES' DEATH; TESTIMONY OF RANSOM, MASTER MECHANIC THAT A SIMILAR BULLETIN HAD BEEN PRINTED AND PUT ON BOARD IN 1908 COULD NOT AFFECT HUGHES, BECAUSE IT REMAINED ON BOARD ONLY A FEW MONTHS AND HUGHES WAS NOT EMPLOYED UNTIL 1910; RANSOM'S TESTIMONY INCREDIBLE AND CONTRADICTED BY CIRCUMSTANCES IN HIS CLAIM THAT HE VERBALLY TOLD HUGHES NOT TO GO UPON RUNNING BOARD OF ENGINE IN MOTION. JURY WERE JUSTIFIED IN DISCREDITING THIS CLAIM. NOTHING IN RULE BOOK FIXING OR DEFINING DUTIES OF TRAVELING FIREMAN. LAW IS THAT RULES AND REGULATIONS OF EMPLOYER MUST BE COMMUNICATED CLEARLY TO EMPLOYE 27, 28

IF THE PETITIONER WAS NEGLIGENT IN RESPECT TO THE CONDITION OF ITS TRACK, AND THIS DEFECTIVE CONDITION OF TRACK CAUSED THE ENGINE TO LEAN DANGEROUSLY CLOSE TO THE BRIDGE, AND WAS ONE OF THE CAUSES OF THE DEATH OF HUGHES, EVEN IF THE JURY SHOULD FIND HUGHES GUILTY OF SOME NEGLIGENCE IN GETTING UPON THE RUNNING BOARD, THIS WOULD ONLY REDUCE THE RECOVERY AND NOT DEFEAT IT, AND THE VERDICT WAS CUT DOWN FROM $17,500 ON THE FIRST TRIAL TO $10,000 UPON THE SECOND TRIAL 31

INDEX OF HEADINGS—Continued

Page

HUGHES WAS ONLY CONCERNED WITH THE MECHANICS OF THE ENGINE, HAD NO DUTY TO PERFORM IN RELATION TO THE TRACK, AND, IN THE ABSENCE OF EVIDENCE SHOWING THAT HE KNEW, OR MUST HAVE KNOWN OF THE DEFECTIVE CONDITION OF THIS TRACK, COULD NOT BE CHARGED WITH ASSUMPTION OF THE RISK ON ACCOUNT THEREOF---------- 39

RECOVERY IN THIS CASE WAS BASED UPON NEGLIGENCE AS TO CONDITION OF TRACK; JUDGE CHARGED JURY FULLY ELIMINATING CLOSENESS OF BRIDGE ALONE AS AN ACTIONABLE DEFECT. JUDGE CHARGED JURY FULLY ON ASSUMPTION OF RISK AS TO ALL PHASES OF THE CASE---------- 42

THE PETITION FOR CERTIORARI CLAIMS THAT PLAINTIFF AND HER WITNESSES AS TO THE CONDITION OF TRACK ARE NOT EXPERTS; OUR REPLY IS THAT PLAINTIFF AND HER WITNESSES WHO TESTIFIED AS TO THE CONDITION OF TRACK TESTIFIED TO FACTS WHICH ANY LAYMAN COULD SEE AND OBSERVE; TESTIFIED AS TO ACTUAL PHYSICAL EFFECT OF DEFECTIVE JOINTS IN TRACK AS MAKING ENGINES SWAY AND ROCK WHICH DID NOT SWAY OR ROCK BEFORE; TESTIFIED TO ACTUAL NEARNESS OF ENGINE IN ITS SWAYING MOTION TO SIDES OF BRIDGE; AND THAT BASED UPON SUCH TESTIMONY, DEFENDANT'S EXPERT MASTER MECHANIC ADMITTED THE CONDITION WAS DANGEROUS ---------- 45, 46

AS TO CLAIM THAT VERDICT SHOULD HAVE BEEN DIRECTED FOR DEFENDANT, WE SAY THAT IN THE FEDERAL AS WELL AS IN THE

INDEX OF HEADINGS—Continued

Page

STATE COURTS, UNDER THIS EVIDENCE, THE CASE WAS FOR THE JURY; AT THE SAME TIME, ALL THE RULES OF PRACTICE IN FEDERAL COURT CAN NOT BE TRANSPLANTED TO THE STATE COURT MERELY BECAUSE A RIGHT ARISING UNDER A FEDERAL STATUTE IS ASSERTED ---------- 50

PETITION FOR CERTIORARI CLAIMS THAT EVIDENCE SHOULD HAVE BEEN INTRODUCED SHOWING JURY METHOD OF REDUCING PAYMENTS TO PRESENT CASH VALUE AND THAT PREVAILING INTEREST RATES SHOULD HAVE BEEN SHOWN BY EVIDENCE. AS MATTER OF FACT PLAINTIFF INTRODUCED THE CARLISLE MORTALITY TABLE SHOWING EXPECTANCY OF LIVES, AND DEFENDANT INTRODUCED THE ANNUITY TABLE SHOWING VALUE OF ANNUITIES OF $1.00 AT INTEREST RATES OF 6% AND 7%, WHICH, UNDER DECISION IN CHESAPEAKE & OHIO VS. KELLY, 241 U. S. 485, IS ONE OF THE METHODS OF PROVING HOW TO REDUCE SUM TO PRESENT VALUE ---------- 53, 54

BUT EVEN HAD THERE BEEN NO PROOF AS TO THE METHOD OF REDUCING FUTURE PAYMENTS TO PRESENT WORTH, AND EVEN HAD THERE BEEN NO EVIDENCE AS TO PREVAILING RATES OF INTEREST, THIS CALCULATION AND THESE RATES ARE MATTERS OF COMMON KNOWLEDGE, AS TO WHICH NO PROOF IS NEEDED, AND THE COURT COULD HAVE PROPERLY LEFT THEM TO THE JURY WITHOUT ANY PROOF WHATEVER. MOREOVER, THE QUESTIONS ARE NOT PROPERLY MADE IN THIS CASE ---------- 57

TABLE OF CASES

Page

Anzolotti vs. McAdoo, 262 Fed. 568 (from N. Y.) and 570 ---- 33, 38

A. K. & N. R. R. vs. Tilson, 131 Ga. 401 ---- 38

Atlanta Ry. vs. McManus, 1 Ga. App. 308 ---- 39

Authement vs. Louisiana Western R. Co., 86 So. 215 (from La.) h. n. 3, and p. 216 ---- 33, 38

Baltimore, etc., R. R. vs. Taylor, 186 Fed. 828 ---- 41

Barrett vs. Virginian Ry., 250 U. S. 473 ---- 53

Central Vermont Ry. vs. White, 238 U. S. 507 ---- 53

Chesapeake & Ohio R. R. Co. vs. DeAtley, 241 U. S. 310, 317 ---- 60

Chesapeake & Ohio vs. Kelly, 241 U. S. 485, 490, 491 ---- 54, 55, 59

Chicago, etc. R. R. vs. Coogan, 271 U. S. 472 ---- 52

Chicago, etc. Ry. Co. vs. Payne, 217 S. W. 810 ---- 40

Code of Georgia, sec. 5926 ---- 52

Florida etc. R. R. vs. Burney, 98 Ga. 1 ---- 54, 55

Ft. Worth etc. Ry. Co. vs. Smithers, 228 S. W. 637 ---- 40

Gainesville etc. Ry. vs. Austin, 122 Ga. 823 ---- 10

Galveston, etc. vs. Thompson, 116 S. W. 106 ---- 41

Gila Valley etc. R. Co. vs. Hall, 232 U. S. 94 ---- 32

Gulf etc. Ry. vs. Moser, 48 S. Ct. 49, 72 L. ed. 64 ---- 59, 60

Gulf etc. Ry. vs. Wells, 48 Sup. Ct. Rep. 151 (72 L. ed. 152) ---- 51

Jones vs. Wilson, 79 S. C. 69 ---- 41

Kirbo vs. Southern Ry. Co., 84 S. E. 491 ---- 40

Lincoln vs. Central etc. R. R., 82 Vt. 187 ---- 41

TABLE OF CASES—Continued

	Page
Lloyd vs. Southern Ry. Co., 81 S. E. 1003	40
L. & N. R. R. vs. Fleming, 69 So. Rep. 125	34, 38
Louisville etc. R. R. vs. Holloway, 246 U. S. 525	62
L. & N. R. R. vs. Trout, 141 Ga. 121, 123	61
McDougall vs. Atchison etc. Ry. Co., 186 Pac. 1028	40
Missouri, K. & T. Ry. Co. of Texas vs. Williams, 103 Tex. 228, 125 S. W. 881, affirming a Texas case in 117 S. W. 1043, also quoted in Neg. and Com. Cases, Vol. 14 p. 20	36
Roberson vs. St. Louis Ry., 213 S. W. 873	32
St. Louis, I. M. & S. Ry. Co. vs. Conley, 187 Fed. 949	35, 37
San Pedro, L. A. & S. L. R. Co. vs. Brown, 258 Fed. 806	34, 38
Sears vs. Atlantic Coast Line R. Co., 86 S. E. 176	40
Shugart vs. A. K. & N., 133 Fed. 505	41
Small Co. vs. Lamborn, 267 U. S. 248	52
Smith vs. Chicago, etc. R. R., 82 Kan. 136, 28 LRA N. S. 1255 and 1256	41
Southern Ry. vs. Davis, 15 Ga. App. 739	38
U. S. Compiled Statutes, 1923 Supplement, Vol. 3 of Annotations, p. 2759	39
Western & Atlantic R. R. vs. Bussey, 95 Ga. 584 h. n. 2, 3, 4, 5 and 6	34
Wilson vs. Atlanta, 63 Ga. 294	39
Wilson case, 212 Ill. App. 271	40